

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

|                              |   |  |
|------------------------------|---|--|
| <b>JAMES WESLEY HUTTON,</b>  | ) |  |
|                              | ) |  |
| Petitioner,                  | ) | <b>2:04-cv-02295-PHX JWS (HCE)</b>     |
|                              | ) |  |
| vs.                          | ) | <b>ORDER FROM CHAMBERS</b>             |
|                              | ) |  |
|                              | ) | <b>[Re: Report and Recommendation]</b> |
| <b>DORA SCHRIRO, et al.,</b> | ) |  |
|                              | ) |  |
| Respondents.                 | ) |  |
| _____                        | ) |  |

**I. MATTER PRESENTED**

At docket 11, Magistrate Judge Hector C. Estrada filed his report and recommendation, recommending that the court dismiss petitioner's petition for writ of habeas corpus. Petitioner did not file any objections to the report and recommendation.

**II. STANDARD OF REVIEW**

The district court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."<sup>1</sup> When reviewing a magistrate judge's report and recommendation in a habeas case, the district court reviews *de novo*

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<sup>1</sup>28 U.S.C. § 636(b)(1).

conclusions of law<sup>2</sup> and findings of fact to which parties object.<sup>3</sup> The court reviews for clear error uncontested findings of fact.<sup>4</sup>

### **III. BACKGROUND**

On October 25, 2004, petitioner James Wesley Hutton, who was incarcerated at the time, filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.<sup>5</sup> By order dated December 21, 2004, the court directed service of the petition upon respondents and ordered petitioner to immediately advise the court of any change of address.<sup>6</sup> The court warned petitioner that “[f]ailure to file a NOTICE OF CHANGE OF ADDRESS may result in the dismissal of the action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).”<sup>7</sup>

Respondents subsequently filed an answer in opposition to the petition,<sup>8</sup> and petitioner filed a response to the respondents’ answer.<sup>9</sup> By minute order dated July 9, 2005, this matter was referred to Magistrate Judge Estrada.<sup>10</sup> A copy of the minute order was mailed to petitioner, but was returned to the court as undeliverable. The

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<sup>2</sup>*Barilla v. Ervin*, 886 F.3d 1514, 1518 (9th Cir. 1989), *overruled on other grounds by Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).

<sup>3</sup>28 U.S.C. § 636(b)(1).

<sup>4</sup>*Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 906 (3d Cir. 1992).

<sup>5</sup>Doc. 1.

<sup>6</sup>Doc. 3.

<sup>7</sup>*Id.* at 3 (emphasis in original).

<sup>8</sup>Doc. 7.

<sup>9</sup>Doc. 8.

<sup>10</sup>Doc. 9.

court's research revealed that petitioner was released from custody on March 14, 2005, and that no other address for petitioner was provided.<sup>11</sup> To date, petitioner has not filed a change of address, nor in any other way notified the court of petitioner's current address.

#### **IV. DISCUSSION**

Having reviewed the magistrate judge's report and recommendation under the standard of review articulated above, the court agrees with the magistrate judge's findings of fact and conclusions of law. Accordingly, the court **ACCEPTS** the report and recommendation at docket 11. The petition at docket 1 is **DISMISSED WITHOUT PREJUDICE** pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute.

DATED at Anchorage, Alaska, this 8<sup>th</sup> day of June 2006.

/s/  
JOHN W. SEDWICK  
UNITED STATES DISTRICT COURT JUDGE

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<sup>11</sup>Doc. 10.